

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

JUN 30 2008

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

MELBOURNE ROBERT AMES, JR.,

Appellant.

2 CA-CR 2007-0159

DEPARTMENT B

MEMORANDUM DECISION

Not for Publication

Rule 111, Rules of  
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20060004

Honorable Michael J. Cruikshank, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General  
By Randall M. Howe and Karla Hotis Delord

Phoenix  
Attorneys for Appellee

R. Lamar Couser

Tucson  
Attorney for Appellant

V Á S Q U E Z, Judge.

¶1 A jury found Melbourne Robert Ames, Jr. guilty of aggravated assault with a deadly weapon, unlawful imprisonment, kidnapping of a minor under the age of fifteen, first-degree burglary, and two counts of aggravated assault of a minor under the age of fifteen, one of the counts a dangerous crime against children under A.R.S. § 13-604.01. The sole issue on appeal is whether the trial court abused its discretion by denying Ames’s requested jury instruction on the defense of duress. For the following reasons, we affirm.

### **Factual and Procedural Background**

¶2 We view the facts in the light most favorable to sustaining the jury’s verdict. *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). On December 20, 2005, Sarah Jensen returned home from work around 8:30 p.m. She shared her apartment with four roommates who were there with two people she knew and two—William Nelson and Robert Ames—whom she had never seen before. Later in the evening, the group apparently decided to buy drugs. After taking “a collection of everyone’s money,” Jensen, Nelson, and Ames drove in Nelson’s truck to the home of Joann K. to buy methamphetamine. On the way, Nelson stopped the truck behind a Wendy’s restaurant. He and Ames got out, had a brief conversation, and then got back in the vehicle. Jensen did not get out of the truck and could not hear the conversation. The three then drove to Joann’s house.

¶3 Joann was at home with her two sons, ages fourteen and six; her mother; and a nephew. Two friends of her older son Jeffrey were also there that evening. At approximately 2:25 a.m., Joann heard a bang at the back door. When she went to

investigate, she saw Nelson, holding a gun and walking toward her with one of her son's friends in a headlock. She ran into a bedroom, slamming the door behind her. She kicked open the window, jumped outside, and ran to a neighbor's house where she called 911 as she hid under the porch. Jeffrey, who had just fallen asleep on the couch, awoke to find his two friends in the room. One was sitting on the couch, and Ames was pointing a shotgun at the other's head. He also saw Nelson, who was holding a handgun. Ames and Nelson asked Jeffrey where his mother was, then Nelson ordered him to his grandmother's bedroom. There, Nelson first held the gun to the grandmother's head and then to Jeffrey's while asking where the security cameras were. As Jeffrey was about to show Nelson where the cameras were, police officers arrived and began banging on the door.

¶4 While Nelson was in the bedroom, Ames was sitting in the kitchen cleaning his shotgun. When he heard the officers knocking on the door, Ames dismantled the gun and hid the pieces in various parts of the house. He then asked for a phone because he "knew he was getting locked up." Ames also told Nelson, who had become agitated by the arrival of the police, to calm down because they had been caught and there was nothing they could do. Nelson then asked Jeffrey the best way to escape. Jeffrey told him to go out the front door, which he did but was later apprehended. Jeffrey, his brother, cousin, and grandmother escaped through the back door of the house, leaving Ames and Jeffrey's two friends inside. Ames and the two boys eventually left the house, and Ames was taken into custody.

¶5 Ames was charged with three counts each of aggravated assault with a deadly weapon and kidnapping; two counts each of aggravated assault of a minor under the age of fifteen and kidnapping a minor under the age of fifteen, which were alleged to be dangerous crimes against children under § 13-604.01; and one count each of first-degree burglary, endangerment, and possessing a deadly weapon as a prohibited possessor. The prohibited-possessor charge was later severed for trial. At the close of the state's case, the court granted Ames's motion pursuant to Rule 20, Ariz. R. Crim. P., for a judgment of acquittal on one count of kidnapping and the endangerment charge. The jury found Ames guilty of all the remaining charges except the kidnapping charge relating to the grandmother. He was acquitted of that charge and instead found guilty of the lesser-included offense of unlawful imprisonment.

¶6 The trial court sentenced Ames to enhanced, mitigated prison terms of five years for aggravated assault and seven years each for aggravated assault of a minor under fifteen, kidnapping of a minor under fifteen, and first-degree burglary. It imposed an enhanced, presumptive, 2.25-year prison term for unlawful imprisonment and ordered all of these sentences to be served concurrently. For the aggravated assault conviction found to be a dangerous crime against children, the court sentenced Ames to an enhanced, mitigated, ten-year prison term to be served consecutively to the other sentences. This appeal followed.

## Discussion

¶7 Ames argues the trial court erred by denying his requested jury instruction on the defense of duress.<sup>1</sup> He contends that the evidence, although slight, was sufficient to warrant such an instruction, and he claims the trial court's refusal to instruct "interfered with and denied his right to present a defense." We review the trial court's denial of a requested jury instruction for an abuse of discretion.<sup>2</sup> *State v. Rosas-Hernandez*, 202 Ariz. 212, ¶ 31, 42 P.3d 1177, 1185 (App. 2002). We will not reverse for failure to give an instruction unless the defendant can demonstrate prejudice. *Id.*

¶8 A defendant is entitled to any jury instruction reasonably supported by the evidence. *State v. Valenzuela*, 194 Ariz. 404, ¶ 2, 984 P.2d 12, 13 (1999); *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995). Section 13-412, A.R.S., which codifies the defense of duress, provides in pertinent part:

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<sup>1</sup>Ames's brief is not in compliance with Rule 31.13, Ariz. R. Crim. P. Although he contends there was "some evidence" to support the instruction, he has utterly failed to support this contention with argument and relevant legal authority, and he has not identified what evidence supports his claim or where that evidence may be found in the record. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (specifying requirements for arguments in appellant's brief); Ariz. R. Crim. P. 31.13(e) (court may strike briefs not in compliance with rule); *State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004) (summarily finding issue waived where appellant did not provide sufficient argument for appellate court to address claim). Nonetheless, in our discretion, we will consider the issue Ames raises.

<sup>2</sup>In his brief, Ames supplied the fundamental error standard of review. However, fundamental error review is only appropriate when a defendant "fails to object to alleged trial error." *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Because this issue was clearly raised and addressed below, we review under a harmless error standard. *See id.* ¶ 18.

Conduct which would otherwise constitute an offense is justified if a reasonable person would believe that he was compelled to engage in the proscribed conduct by the threat or use of immediate physical force against his person . . . which resulted or could result in serious physical injury which a reasonable person in the situation would not have resisted.

Thus, to be entitled to a duress instruction, Ames needed to provide some evidence that Nelson had threatened him with the immediate use of force if he did not participate in the crime. *See State v. Walker*, 185 Ariz. 228, 240, 914 P.2d 1320, 1332 (App. 1995); *State v. Jones*, 119 Ariz. 555, 558, 582 P.2d 645, 648 (App. 1978).

¶9 Although Ames had planned to testify at trial to support his claim of duress, he ultimately elected not to and instead argued that Jensen’s testimony alone was sufficient to warrant the instruction. Jensen testified that, out of her presence, Nelson and Ames had a conversation on the way to Joann’s house. When they arrived at the house, Nelson got out and began talking to someone in the front yard while she and Ames sat in the truck. A few minutes later, Ames got out of the truck, telling her as he was leaving to stay in the truck. Jensen testified that, when he told her to stay, he was “teary-eyed . . . just real . . . sad” and “he had an uncertain kind of tone to his voice, like . . . [he] wasn’t sure what was going to happen.” When defense counsel asked her how Ames had looked, she stated he “looked like he was being forced . . . ,” but the prosecutor objected before she could finish, and the comment was ordered stricken.

¶10 On cross-examination, the prosecutor elicited the following testimony from Jensen:

[PROSECUTOR]: First of all, on this night when you went over to the [victim's] house you never saw any[one] threaten [Ames], did you?

[JENSEN]: No.

[PROSECUTOR]: You never saw this other guy [Nelson] pull a gun on [him]?

[JENSEN]: No.

[PROSECUTOR]: You never saw him tell [Ames] what to do?

[JENSEN]: No.

[PROSECUTOR]: You never saw [Nelson] order [him] into the house?

[JENSEN]: No.

¶11 Ames presented no other evidence and, contrary to his assertion, Jensen's testimony does not support his claim of duress. From the evidence presented at trial, the jury could reasonably infer Ames had participated voluntarily in the commission of the crimes. *State v. Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d 455, 458 (App. 2003) (substantial evidence of guilt, circumstantial or direct, is evidence reasonable jury can accept as sufficient to infer guilt beyond reasonable doubt). At most, Jensen's testimony might arguably have shown Ames was reluctant to participate. But there was no evidence Nelson had threatened to hurt Ames if he did not participate or that Ames's participation in the crimes was anything but voluntary. Jensen's testimony established that, when they arrived at the victim's house, Ames chose of his own volition to get out of the truck and go inside. Therefore, the

evidence does not support a duress defense, and the trial court did not abuse its discretion in refusing to give the requested instruction. *See Bolton*, 182 Ariz. at 309, 896 P.2d at 849; *Walker*, 185 Ariz. at 240, 914 P.2d at 1332.

**Disposition**

¶12 For the reasons stated above, we affirm.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge